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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1064

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

J. RICHARD TOWNSEND
Route 2, Box 294
Martinez, California 94553

ALBERT E. CRONIN, JR.
320 Wells Fargo Building
Stockton, California 95202

Attorneys for Petitioner
Stockton Port District

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Question Presented	2
IV. Statutes Involved	3
V. Statement of the Case	3
VI. Reasons for Granting the Writ	7
A. The Commission and the Court of Appeals Have Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	7
1. The Question of Federal Law	7
2. Importance of the Question	13
B. The Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision	14
VII. Conclusion	16
Certificate of Service	17
Appendix:	
A. Statutes Involved	App. 1
1. Section 15 of Shipping Act, 1916 (46 U.S. Code 814)	App. 1
2. Section 16(First) and (Second) of Shipping Act, 1916 (46 U.S. Code 815)	App. 2
3. Section 8 of Merchant Marine Act, 1920 (46 U.S. Code 867)	App. 2

Page

4. Section 205 of Merchant Marine Act, 1936 (46 U.S. Code 1115) ..... App. 3
5. Section 10(e) of Administrative Procedure Act (5 U.S. Code 706, formerly 1009) ..... App. 4
6. Section 551 of Title 33 of U.S. Code ..... App. 5

B. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. 6

C. Report and Order of Federal Maritime Commission ..... App. 10
Majority Report ..... App. 11
Dissenting Opinion of Commissioner Hearn ..... App. 44
Commission's Order ..... App. 51
Appendix A of Commission's Report ..... App. 53
Amended Order of Commission ..... App. 56
Report of Commissioner John S. Patterson ..... App. 58

D. Conference Member Lines Who Are Respondents Herein ..... App. 81
1. Pacific Westbound Conference ..... App. 81
2. Pacific-Straits Conference ..... App. 82
3. Pacific/Indonesian Conference ..... App. 84

TABLE OF AUTHORITIES CITED

Cases	Pages
City of Portland v. Pacific Westbound Conference, 4 F.M.B. 664 (1955)	3, 9, 10
Consolo v. Federal Maritime Commission, 386 U.S. 607 (1966)	15
Pacific Far East Line v. United States, 246 F(2d) 711 (C.A. D.C. 1957)	3, 9, 10, 12
Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, 314 F(2d) 928 (C.A. 9th 1963)	15

Statutes	
Administrative Procedure Act:	
Section 10(e) (5 U.S.C. 1009)	3, 15
Merchant Marine Act, 1920:	
Section 8 (46 U.S.C. 867)	3, 8, 9, 10
Merchant Marine Act, 1936:	
Section 205 (46 U.S.C. 1115)	3, 10
Public Law:	
No. 560, 69th Congress, 2nd Session	7
No. 392, 75th Congress, 1st Session	8
No. 296, 80th Congress, 2nd Session	8
89-298	8, 11
Review Act of 1950:	
Section 2 (5 U.S.C. 1032)	4
Section 4 (5 U.S.C. 1034)	4
Section 10 (5 U.S.C. 1040)	2
River and Harbor Act of 1927 (44 Stat. 1014)	7
Shipping Act, 1916 (46 U.S.C. 801 et seq.)	4
Section 15 (46 U.S.C. 814)	3, 4, 13
Section 16 (First) and (Second) (46 U.S.C. 815)	3, 13
U. S. Code:	
Title 28, Section 1254 (1)	2
Title 33, Section 541	11
Title 33, Section 542	11
Title 33, Section 551	3, 8

MISCELLANEOUS

Pages

House Documents:

No. 554, 68th Congress, 2nd Session 8

No. 15, 75th Congress, 1st Session 8

No. 752, 80th Congress, 2nd Session 8

No. 208, 89th Congress, 1st Session 8, 11

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FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines,* and STATE OF CALIFORNIA,†
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Stockton Port District prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on November 21, 1966.

*The names of the Conference member lines who are respondents herein, as set forth in their respective petitions for leave to intervene filed in the Court of Appeals, are specified in Appendix D hereto, commencing at page 81 of the Appendix.

†The State of California is appearing herein on behalf of the San Francisco Port Authority.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 369 F.(2d) 380. It is reproduced in Appendix B hereto (App. p. 6)*. The report and order of the Federal Maritime Commission which are involved herein are reported in 9 F.M.C. 12, and are reproduced in Appendix C hereto (App. p. 10), together with the dissenting opinion of Commissioner Hearn and the concurring opinion of Commissioner Patterson.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1966. The jurisdiction of this Court is invoked under Section 10 of the Review Act of 1950 (5 U.S.C. 1040) and 28 U.S.C., Section 1254(1).

III.

QUESTION PRESENTED

The question presented is the lawfulness of the practice whereby steamship carriers divert cargo from the nearest port through which it would normally move to a more distant port by the payment of the difference in land transportation charges to the respective ports.†

This question has never been decided by the Supreme Court. A similar case reached the Court of Appeals, and an order of the Federal Maritime Board ruling such practice to be unlawful was affirmed on the ground that the Board had a duty to promote and encourage the use by vessels of

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*Pages of the Appendix hereto will be cited as "App. p. 1", etc.

†For convenience this practice is hereinafter referred to as "port equalization".

ports adequate to care for the freight that would naturally pass through such ports. (*City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955); *Pacific Far East Line v. United States*, 246 F.(2d) 711 (C.A.D.C. 1957).)

IV.

STATUTES INVOLVED

The statutes involved in this case are:

Sections 15 and 16 (First) and (Second) of the Shipping Act, 1916 (46 U.S. Code Sections 814 and 815, 39 Stat. 733, 734, 75 Stat. 763);

Section 8 of the Merchant Marine Act, 1920 (46 U.S. Code Section 867, 41 Stat. 991);

Section 205 of the Merchant Marine Act, 1936 (46 U. S. Code Section 1115, 49 Stat. 1987);

Section 10(e) of the Administrative Procedure Act (5 U.S. Code Section 706 (formerly 1009), 60 Stat. 243); and

Section 551 of Title 33 of the U. S. Code (40 Stat. 1286).

Because of the length of such statutes, their text is set forth in Appendix A hereto (App. p. 1 et seq.).

V.

STATEMENT OF THE CASE

The decision and order of the Court of Appeals to which this petition is directed permit steamship conferences and steamship lines—and even foreign steamship lines—to thwart the will and intent of Congress that ports shall be used by vessels for freight that would naturally pass through them, and to determine which ports in the United States shall be used and hence prosper and which shall suffer by disuse.

This case involves a petition to review and set aside, in part, a final order of the Federal Maritime Commission (hereinafter referred to as the Commission) entered under authority of the Shipping Act, 1916 (46 U.S.C. 801 et seq.). Petitioner Stockton Port District was the complainant in the proceeding before the Commission.

The jurisdiction of the Court of Appeals was based on Sections 2 and 4 of the Review Act of 1950 (5 U.S.C. 1032, 1034).

Petitioner Stockton Port District is a public corporation and a political subdivision of the State of California, and operates the wharves and other facilities comprising the Port of Stockton. That port is located on an improvement project authorized by Congress in the San Joaquin Valley in California, 84 miles by water from the Golden Gate. (Com. Rep. 5, 22, R. 1270, 1287*, App. pp. 15-16, 37.)

Petitioner filed a complaint with the Commission pursuant to the Shipping Act, 1916 (46 U.S.C. 801 et seq.), alleging that provisions of the tariffs of the respondent conferences and their members which permit port equalization of the type hereinabove described, and the practices thereunder against the Port of Stockton, were unlawful.

The respondents in the proceeding before the Commission were three steamship conferences functioning under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and their respective member lines—namely, the Pacific Westbound Conference, the Pacific-Straits Conference, and the Pacific/Indonesian Conference. The lists of the member lines of these Conferences set forth in Appendix D hereto

*Pages of the Commission's Report as contained in the Record before the Court of Appeals, and the pages of the Court Record, will be indicated in this manner. The pages of the Appendix hereto where the same material appears in the Commission's Report are also indicated.

show that the Pacific Westbound Conference is composed of 22 steamship lines of which 15, or 68 percent, are foreign lines, that 9 of the 14 members of the Pacific-Straits Conference, or 64 percent, are foreign steamship lines, and that 5 of the 8 members of the Pacific/Indonesian Conference, or 62 percent, are foreign lines.

After a hearing the Commission issued a report (App. p. 10 et seq.) in which it found that the ocean freight rates of the respondent ocean carriers were the same from Stockton and San Francisco Bay ports to the Far East (Com. Rep. 3, 23, R. 1268, 1288, App. pp. 13, 38), that the inland transportation rates from the relevant area, the San Joaquin Valley, were lower to Stockton than to San Francisco and the other ports involved (Com. Rep. 11-14, R. 1276-79, App. pp. 24-27), that without port equalization much of the equalized cargo would move through Stockton (Com. Rep. 7-8, R. 1272-73, App. p. 19), and that the Port of Stockton has lost substantial revenue from terminal charges on the equalized cargo that it would otherwise have received (Com. Rep. 5, R. 1270, App. p. 16).

As a result of the port equalization by means of the payment by the ocean carriers of part of the shipper's inland transportation charges to the port of loading, the Port of Stockton has therefore lost a substantial volume of cargo which would move over that port in the absence of the port equalization.

The majority of the Commission concluded that the port equalization rules and practices were *not unlawful* in the case of port equalization against the Port of Stockton *on cargo loaded at San Francisco or any other port located on San Francisco Bay*. This conclusion was based on the Commission's finding that such port equalization was beneficial to shippers and to the ocean carriers desiring to equalize

over San Francisco Bay ports instead of sending their vessels to Stockton. (Com. Rep. 8, 20-22, R. 1273, 1285-87, App. pp. 20, 34-36.)

Commissioner Hearn filed a vigorous dissenting opinion (Com. Rep. 27A, R. 1293, App. p. 44).

The Petition for Review filed with the Court of Appeals was directed against the failure of the Commission to hold such port equalization on cargo loaded at San Francisco Bay ports unlawful.

Among the contentions advanced by petitioner before both the Commission and the Court of Appeals was that such port equalization violated the policy and intent of Congress as set forth in various statutes and certain action of Congress hereinafter indicated, and that consequently the Commission's failure to hold the port equalization unlawful on cargo loaded at San Francisco Bay ports was erroneous.

The Commission rejected this argument. In his dissenting opinion Commissioner Hearn declared:

> "I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. * * *" (Com. Rep. 28, R. 1294, App. p. 45.)

The Court of Appeals did not discuss or even mention petitioner's contention in this respect in its opinion. The Court was concerned only with the limitations of its powers to review evidentiary matters, and failed to comply with its duty to consider and decide questions of law that were presented to it.

VI.

REASONS FOR GRANTING THE WRIT

A. The Commission and the Court of Appeals Have Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

1. The Question of Federal Law.

The question of federal law here involved which has not been, but should be, settled by this Court is whether certain federal statutes and certain action of Congress establish a Congressional policy and intent that condemns, as a matter of law, port equalization whereby ocean carriers, instead of sending their vessels to load cargo at the port through which it would otherwise move, divert the cargo to another port for loading by paying the shipper the additional inland transportation charges involved in transporting the cargo to the port of loading.

The Commission concluded that the lawfulness of port equalization should be determined on the basis of whether it is beneficial to shippers and to the equalizing carriers. It found that the port equalization here involved was beneficial to shippers and to the equalizing carriers, and hence lawful. The Court of Appeals affirmed the order of the Commission. Petitioner contends that the Commission and the Court of Appeals erred in this respect, since the test applied by the Commission is a direct violation of the policy and intent of Congress hereinafter discussed.

The Port of Stockton was developed as a federal river and harbor improvement project after approval of the project by Congress (Com. Rep. 22, R. 1287, App. p. 37; River and Harbor Act of 1927, Public Law 560, 69th Congress, 2nd Session, 44 Stat. 1014). Such Congressional approval was based on a study and report of the United States Army Engineers which concluded that the development of

the Port of Stockton was economically feasible on the basis of the cargo that could be expected to move through that port because of lower inland transportation rates from the origin of the cargo, and that such port would be beneficial to the public and hence in the public interest (House Document 554, 68th Congress, 2nd Session). As a result of such Congressional approval, vast sums of federal and local public funds and private funds were spent in the development of the Port of Stockton and its waterways. Subsequent improvements of the waterways to the Port of Stockton have also been approved by Congress on the basis of similar studies and reports of the Army Engineers. (Public Law 392, 75th Congress, 1st Session, 49 Stat. 1622, House Document 15, 75th Congress, 1st Session; Public Law 296, 80th Congress, 2nd Session, House Document 752, 80th Congress, 2nd Session; Public Law 89-298, House Document 208, 89th Congress, 1st Session.)

The policy of Congress with respect to the development of ports has been declared as follows by Congress in 33 U.S. Code 551 (App. p. 5):

> "It is declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality or other public agency of the State and open to the use of all on equal terms. * * *"

The various River and Harbor Acts adopted by Congress, including those pertaining to the Port of Stockton, are an implementation of this policy.

In and by Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867), Congress has specified "the object of promoting, encouraging, and developing ports and transporta-

tion facilities in connection with water commerce", and has declared that "the use by vessels of ports adequate to care for the freight which would naturally pass through such ports" shall be promoted and encouraged. Congress has thus determined that the use of such ports by vessels is in the public interest.*

A violation of the principles of Section 8 of the Merchant Marine Act, 1920, was held by the Commission's immediate predecessor, the Federal Maritime Board, to require it to hold certain port equalization unlawful. The Board's decision in this respect was upheld by the United States Court of Appeals for the District of Columbia. In the case of *Pacific Far East Line v. United States*, 246 F.(2d) 711 (C.A. D.C. 1957), the Court of Appeals upheld the Board's decision in *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), which held that port equalization against ports in Oregon and Washington on certain products loaded at California ports was "unjustly discriminatory and unfair as between ports within the meaning of Section 15 of the Act and detrimental to the United States *as contrary to the principles of Section 8 of the Merchant Marine Act*",† since it resulted in the diversion of traffic which otherwise would naturally pass through the complaining ports. (See 246 F.(2d) 714.) In the *City of Portland* case the Board said:

> *"Section 8 charges the Board with the duty to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports."* (4 F.M.B. 679.)

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*Section 8 of the Merchant Marine Act, 1920, is quoted in its entirety at pages 2-3 of the Appendix hereto.

†All emphasis in quotations is supplied unless otherwise indicated.

In upholding the Board's decision, the Court of Appeals relied on the policy of Congress expressed in Section 8 of the Merchant Marine Act, 1920. With respect to Section 8 of that Act the Court said:

> "While we need not decide that this section (conferring the power to investigate) confers power to act to promote ports, it is indicative of a congressional policy favoring port improvement and development. That policy having been expressed, the Board could, *if it was not bound to do so,* examine the practices here complained of in the light of that policy, and exercise its power to approve or disapprove such practices *accordingly.* The Board did consider this policy in determining whether or not to approve equalization as practiced by the Conference. We must therefore conclude that the Board's orders here under attack *were authorized and supported by statute.*" (246 F.(2d) 716.)

In our case, as in the *City of Portland* case, the port equalization diverts freight from the port through which it would otherwise naturally pass (the Port of Stockton).* Since this was held to be a violation of the principles and policy of Section 8, and hence to make the port equalization unlawful, in the *City of Portland* case, similarly here, as the Court suggested in the *Pacific Far East Line* case, the violation of the principles and policy of Section 8 should have been held, as a matter of law, to render the port equalization unlawful.

The intent of Congress that ports should be used is likewise apparent from Section 205 of the Merchant Marine Act, 1936 (46 U.S.C. 1115, App. p. 3). There Congress made it unlawful for any common carrier by water or any con-

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*In its report the Commission found: "Without equalization much of the cargo would move through Stockton". (Com. Rep. 7-8, R. 1272-73, App. p. 19.)

ference to prevent or attempt to prevent any other such carrier from serving a federally improved port at the same rates which it charges at the nearest port already regularly served by it.

Moreover, it is a matter of common knowledge that Congress has spent vast sums of public funds in developing and improving ports throughout the United States, and has encouraged the spending of local public funds to that end. Up to the time of the hearing in this proceeding the sum of $23,000,000 had been invested in the Port of Stockton, consisting of $9,800,000 by the Stockton Port District, $3,200,000 by the City of Stockton, $3,800,000 by the Federal Government, $500,000 by the State of California, and $5,700,000 by private investors. (Com. Rep. 5, 29; R. 1270, 1295, App. pp. 15, 45.) Since the hearing, in the year 1965 Congress approved a project for deepening and otherwise improving the waterways to Stockton which will involve the expenditure of approximately $61,000,000. (Public Law 89-298; House Document No. 208, 89th Congress, 1st Session.)

Before federal funds are spent on port projects, investigations are made by the Corps of Engineers of the United States Army pursuant to Sections 541 and 542 of Title 33 of the United States Code, to determine the economic feasibility of the project. Among other things, the Corps of Engineers is directed by Congress to "have in view *the amount and character of commerce existing or reasonably prospective* which will be benefited by the improvement".

The enactment of these statutes and such expenditure of federal funds establish the policy and intent of Congress that ports shall be developed and that they should be used by vessels for handling cargo that would naturally move through them. Congress has thus declared this to be in the public interest. Congress would certainly not have spent the

vast sums for developing and improving ports, and would not have encouraged others to do so, if it had intended that such ports should not be used, and it certainly did not intend that the determination of which ports shall prosper by use by vessels and which shall suffer from disuse shall be left to the determination of steamship conferences and steamship lines by means of an artificial device such as port equalization.

Yet that is exactly the result produced by the decisions of the Commission and the Court of Appeals in this case. As Commissioner Hearn said in his dissenting opinion (Com. Rep. 28, R. 1294, App. p. 45),

> "I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. * * *"

The Commission's conclusion that the lawfulness of port equalization is to be determined on the basis of whether the diversion of the cargo away from the port of the normal movement to another port is beneficial to shippers and to the equalizing carriers is a clear violation of this Congressional policy and intent, and is hence erroneous.

The Supreme Court has never considered the question of the lawfulness of port equalization of the type involved here. For the reasons set forth hereinafter it is important that this Court consider this question and decide whether—as the Court of Appeals for the District of Columbia suggested in *Pacific Far East Line v. United States*, supra—the policy and intent of Congress with respect to the development and use of ports must be obeyed by the Commission, and require it to conclude that port equalization which violates the Congressional policy and intent is contrary to the

public interest in violation of Section 15 of the Shipping Act, 1916 (46 U.S.C. 814) and results in unjust discrimination and undue preference and prejudice between ports in violation of Sections 15 and 16 (First) of that Act (46 U.S.C. 814, 815).

2. Importance of the Question.

Although the decision here involved applies directly only to the Port of Stockton, the principle of the decision affects every port in the United States and is highly important to every port.

The decision of the Commission, which has been affirmed by the Court, holds that the lawfulness of port equalization is to be determined by the Commission on the basis of whether the port equalization under consideration, in the opinion of the Commission, is beneficial to shippers and to the ocean carriers desiring to equalize.

Actually where port equalization would be employed by the ocean carriers, it would benefit them by saving the cost of sending their vessels to the port equalized against, and the shippers whose cargo was equalized would be benefited by paying no more for their transportation than to the cheapest port and by having the service of additional steamship lines available and in some instances having their cargo loaded at the last port of call. Under the principle of the decision here involved, therefore, the Commission could be expected to hold the port equalization lawful, and the fate of every port in the country is therefore in the hands of the steamship conferences and the steamship lines, and indeed even foreign steamship lines, depending on whether they decide to practice port equalization against a particular port or not. In this connection it should be noted that the Commission found that when the Conference tariff permits

port equalization, "carriers find that competition compels them to equalize". (Com. Rep. 8, R. 1273, App. p. 19.)

We submit that the Commission's test of lawfulness is an incorrect interpretation of the law which would place the vast investment in every port in the country in jeopardy, since no port would ever know whether or when ocean carriers would institute the practice of port equalization against it and whether the Commission would hold such equalization lawful. Not only would the servicing of outstanding bonds issued for port development be in serious jeopardy, but the advisability of spending additional sums for port improvement and for the development of new ports would be highly questionable—all clearly contrary to the intent of Congress.

Since this Court has never considered this type of port equalization, it is very important to the ports throughout the country that this Court consider this matter and determine whether the statutes and Congressional action hereinabove mentioned establish a Congressional policy and intent which make such port equalization unlawful.

B. The Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

This case involves a "Petition for Review of an Order of the Federal Maritime Commission" which was filed with the Court of Appeals for the Ninth Circuit. Among other things, petitioner presented to the Court of Appeals the question of law which is discussed hereinabove—namely, whether the statutes and action of Congress mentioned preclude the Commission, as a matter of law, from holding that the port equalization in question is lawful.

Under Section 10(e) of the Administrative Procedure Act (5 U.S.C. 706 (formerly 1009), App. p. 4), a question of law is one of the specified grounds of judicial review. In fact that section provides:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions * * *."

The Court of Appeals failed to comply with this "accepted and usual course of judicial proceedings". It did not review the Commission's decision in the manner required by law. Its opinion shows that in denying the petition for review the Court did not interpret the statutory provisions hereinabove cited which were presented to the Court and it did not decide the presented question of law of whether the statutes and action of Congress hereinabove mentioned establish a Congressional policy and intent that render the port equalization here involved unlawful.

The decision relied upon by the Court primarily in its opinion (App. p. 7), *Consolo v. Federal Maritime Commission*, 386 U.S. 607 (1966), is not in point in this connection. That case did not involve a question of law, as is here involved, but only the question whether there was substantial evidence to support the Commission's decision. This is apparent from the fact that in specifying the scope of authorized judicial review in the *Consolo* case, the Supreme Court omitted the portion of Section 10(e) of the Administrative Procedure Act which authorizes review of questions of law, and mentioned only the substantial evidence portion.

The other case cited by the Court of Appeals, *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.(2d) 928 (C.A. 9th, 1963), likewise involved factual matter, since the Court held that the Commission could construe certain words in a conference agree-

ment "in the light of the record which was before the Commission". (Page 935.)

The Court of Appeals departed from the accepted and usual course of judicial proceedings in concluding that the Commission's conclusions have "a reasonable basis in law" without even discussing the important legal question which petitioner had raised with respect to the effect of the Congressional policy and intent on the lawfulness of equalization. Such departure by the Court of Appeals from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

Petitioner is entitled to have this important question of law decided by a court. Since the Court of Appeals did not mention this question in its opinion and did not decide it, the Supreme Court should consider this case and should decide this question of law.

VII.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. RICHARD TOWNSEND
Route 2, Box 294
Martinez, California 94553

ALBERT E. CRONIN, JR.
320 Wells Fargo Building
Stockton, California 95202

Attorneys for Petitioner
Stockton Port District

Dated: February 13, 1967.

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit upon counsel for all respondents in this proceeding by mailing, by air mail, postage prepaid, three copies thereof to each of the following:

Honorable Thurgood Marshall,
Solicitor General,
Department of Justice,
Washington, D. C. 20573;

James L. Pimper,
General Counsel,
Federal Maritime Commission,
1321 H Street N. W.,
Washington, D. C. 20573

and by mailing two copies thereof by regular first-class mail, postage prepaid, to each of the following:

Gordon L. Poole,
Lillick, Geary, Wheat, Adams & Charles,
311 California Street,
San Francisco, California 94104
Attorney for Pacific Westbound Conference and Its Member Lines

Leonard G. James,
Graham, James & Rolph,
310 Sansome Street,
San Francisco, California
Attorney for Pacific-Straits Conference, Pacific/Indonesian Conference, and Their Respective Member Lines

Miss Miriam E. Wolff,
Deputy Attorney General,
6000 State Building,
San Francisco, California
Attorney for State of California

Dated at San Francisco, California, February 13, 1967.

J. RICHARD TOWNSEND
Attorney for Petitioner
Stockton Port District

(Appendices A, B, C and D Follow)

Appendix A

STATUTES INVOLVED

1.

Section 15 of Shipping Act, 1916 (46 U.S. Code 814, 39 Stat. 733, 75 Stat. 763).

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation

of this Act, and shall approve all other agreements, modifications, or cancellations. * * *"

2.

Section 16 (First) and (Second) of Shipping Act, 1916 (46 U.S. Code 815, 39 Stat. 734)

"* * * * * * *

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

* * * * * * *"

3.

Section 8 of Merchant Marine Act, 1920 (46 U.S. Code 867, 41 Stat. 992)

"That it shall be the duty of the board, in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and

the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law."

4.

Section 205 of Merchant Marine Act, 1936 (46 U.S. Code 1115, 49 Stat. 1987)

"Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any com-

mon carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

5.

Section 10(e) of Administrative Procedure Act (5 U.S. Code 706 (formerly 1009), 60 Stat. 243)

"SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by

any party, and due account shall be taken of the rule of prejudicial error."

6.

Section 551 of Title 33 of U.S. Code (40 Stat. 1286)

"It is declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality or other public agency of the State and open to the use of all on equal terms. The Secretary of the Army, through the Chief of Engineers, shall give full publicity, as far as may be practicable, to this provision."

Appendix B

Opinion of United States Court of Appeals for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

No. 20,544

Stockton Port District,
Petitioner,

vs.

Federal Maritime Commission and United States of America,
Respondents.

[November 21, 1966]

On Petition for Review of Order of the Federal Maritime Commission.

Before POPE, BROWNING and DUNIWAY, Circuit Judges.

Per Curiam.

This is a petition to review an order of the respondent Federal Maritime Commission. Petitioner filed a complaint before the Commission naming Pacific Westbound Conference, the Pacific Straits Conference, the Pacific/Indonesian Conference, and individual members of the Conferences, as respondents. The complaint alleged that certain port equalization provisions in the tariffs of such Conferences were unlawful and void when applied against the Port of Stockton. After finding that certain of the port equalization provisions were unlawful, the Commission held that the port

equalization rules and practices of these Conferences were not unlawful in the case of port equalization against the Port of Stockton on cargo loaded at San Francisco or any other port located on San Francisco Bay, and entered an order accordingly. It is this portion of the order which petitioner asks us to review and set aside.

The report, opinion and order of the Commission are entitled No. 1086 Stockton Port District v. Pacific Westbound Conference et al., Decided September 28, 1965, and are reported in 9 F.M.C. 12, where the facts, the contentions of the parties, and the rulings of the Commission are fully set forth. We deem it unnecessary therefore to recite these matters in the opinion of this court.

As we approach this matter we bear in mind the limitations upon our powers as a reviewing court to substitute our judgment or discretion for that of the agency. These were set forth recently in the case of Consolo v. Federal Maritime Comm'n., 386 U.S. 607, 619-621, as follows: "Section 10(e) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009(e) (1964 ed.)) gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . .' Cf. United States v. Interstate Commerce Comm'n, 91 U.S. App. D.C. 178, 183-184, 198 F. 2d 958, 963-964, cert. denied, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292,